

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DAVID FOSTER, :
: NO. 1:11-CV-00256
Petitioner, :
: :
: :
v. : **OPINION AND ORDER**
: :
: :
WARDEN, CHILLICOTHE :
CORRECTIONAL INSTITUTION, :
: :
: Respondent.

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 13), to which Respondent objected (doc. 14). In his Report & Recommendation, the Magistrate Judge recommends that the Court deny Respondent's Motion to Dismiss (doc. 8).

The issues presented here are well-detailed in the Magistrate Judge's Report and Recommendation. In brief, in her Motion to Dismiss, Respondent contends that Petitioner's petition was untimely filed. According to Respondent, Petitioner's conviction either became final on October 31, 2006, ninety days after the Ohio Supreme Court denied review of the state appellate court's decision on Petitioner's first direct appeal or on March 25, 2008, ninety days after the Ohio Supreme Court declined review on Petitioner's first resentencing decision (doc. 8). The Magistrate Judge, however, determined that Petitioner's conviction did not become final on direct review until April 26, 2010, when

the United States Supreme Court denied certiorari, making his habeas petition, filed April 25, 2011, timely (doc. 13).

The Court does not find persuasive Respondent's argument that Petitioner's "second resentencing was just a vehicle to get yet another bite at the appellate apple" (doc. 14). Instead, the Court finds the Magistrate Judge's interpretation and application of the relevant case law to be correct and therefore concludes that denial of Respondent's Motion to Dismiss is appropriate.

Having reviewed this matter pursuant to 29 U.S.C. § 636(b), the Court ADOPTS and AFFIRMS the Magistrate Judge's Report and Recommendation in its entirety (doc. 13) and thus DENIES Respondent's Motion to Dismiss (doc. 8).

SO ORDERED.

Dated: March 20, 2012

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge